State Intervention in the Family: Making a Federal Case Out of It

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In recent years, the United States Supreme Court has erected major obstacles for parents seeking federal review of child protection laws. This Article is based on the author's belief, which is not necessarily shared by the current Court, that litigants may be more successful in challenging child protection laws in federal rather than state court. This Article is not concerned primarily with substantive law but with procedural law. Rather than addressing the merits of a challenge to child protection laws, this Article is concerned with how to get into federal court. A journey through the Court's obstacle course may prove instructive to lawyers struggling over how to avoid state court litigation entirely or how to preserve certain issues for lower federal court review.

I. SUBSTANTIVE BARRIERS TO FEDERAL JURISDICTION

For many years, access to federal courts was difficult or impossible whenever the underlying issue involved the parent-child relationship. The history of federal court involvement in the area broadly known as domestic relations is worth examining briefly.[1] In two early cases, the Supreme Court fashioned the so-called domestic relations exception to federal court jurisdiction, which posited that generally cases in this area of the law are not to be heard in federal court. The exception has frequently been misunderstood and given broader meaning than the facts from which it was fashioned warrant.[2]

In *In re Burrus*[3] the Supreme Court dismissed a petition for a writ of habeas corpus brought by a father seeking to recover custody of his child from the child's grandparent. The Court concluded that federal jurisdiction did not lie because "there was no pretence that the child was restrained of its liberty, . . . under or by virtue of any authority of the United States, or that [the grandparent's] possession of the child was in violation of the Constitution or any law or treaty of the United States."[4] *Burrus* thus stands for the proposition that federal courts have power to decide child custody cases only "when, by reason of some other matter or thing in the case, the court has jurisdiction."[5]

In the second case, *Matters v. Ryan*,[6] a Canadian mother petitioned for the release of her child from the custody of an American woman. *Matters* reaffirmed the

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1. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1189–92 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER].

2. *See, e.g.*, Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972) ("it has been the policy of federal courts to avoid assumption of jurisdiction in [state domestic relations cases]").

3. 136 U.S. 586 (1890).

4. *Id.* at 593.

5. *Id.* at 597.

6. 249 U.S. 375 (1919).

truism that "'the jurisdiction of the courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States.'"[7] Because the case involved only an "unsubstantial and frivolous" federal claim, the writ of habeas corpus was dismissed.[8]

Burrus and *Matters* stand for the unexceptionable rule that a federal court is empowered to issue writs of habeas corpus only when a petitioner presents a substantial claim that his or her child is held in custody in violation of federal law.[9] Yet, for most of this century, the two cases were considered to require dismissal of federal actions that involved domestic relations even when there plainly was jurisdiction.

The effect of *Burrus* and *Matters* is mostly history now.[10] In recent years, lower federal courts have shown no hesitation in accepting jurisdiction in cases whose substantive issues involve domestic relations so long as the cases proceed on a jurisdictional grant conferred by Congress. As one court has said, "[T]he fact that, incidental to the exercise of federal jurisdiction, there is an impact or effect on a matter which is cognizable in the state courts cannot divest the federal court of its power."[11]

Even if a broad domestic relations exception to federal jurisdiction existed, it would have force only in traditional domestic relations cases such as divorce, separation, and child custody disputes. These disputes are readily distinguishable from child protective and termination of parental rights proceedings, the types of cases with which this Article is concerned, because of the degree of state action. Involuntary state intervention in the family is paradigmatically state action properly limited by the due process clause of the fourteenth amendment since such intervention is initiated by the state pursuant to state law. Thus, although lawyers litigating these cases in federal courts have had to contend with the domestic relations exception in their briefs, the exception is no longer a significant obstacle to access to the federal courts.[12]

It is now clear that there is no domestic relations exception which defeats federal

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7. *Id.* at 377 (quoting Carfer v. Caldwell, 200 U.S. 293, 296 (1905)).

8. *Id.*

9. Note, *The Use of Federal Habeas Corpus in Child Custody Disputes*, 31 ME. L. REV. 265, 275 (1980).

10. But see Diaz v. Diaz, 568 F.2d 1061 (4th Cir. 1977), and Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974), in which, due to the peculiarly local interests involved, the courts invoked abstention rather than deny jurisdiction.

For a current discussion of the vitality of the domestic relations exception in diversity jurisdiction cases, see Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. REV. 661 (1983); Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983).

11. Spindel v. Spindel, 283 F. Supp. 797, 810 (E.D.N.Y. 1968); *see also* Rosenstiel v. Rosenstiel, 278 F. Supp. 794 (S.D.N.Y. 1967) (granting diversity jurisdiction in determination of validity of a divorce decree); Rapoport v. Rapoport, 273 F. Supp. 482 (D. Nev. 1967) (granting diversity jurisdiction for declaratory judgment as to marital status of parties), *rev'd on other grounds*, 416 F.2d 41 (9th Cir. 1969). Other cases which directly involve familial relationships include Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (action by children against mother who caused father to leave them); Brandtscheit v. Britton, 239 F. Supp. 652 (N.D. Cal. 1965) (declining federal jurisdiction upon failure of plaintiff to secure redress in state court); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (father's tort action against mother to get custody of his Lebanese daughter). *See also* Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135, 173 & n.8 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting), *aff'd*, 458 U.S. 502 (1982).

12. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) (three-judge court); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

court jurisdiction that is otherwise properly conferred.[13] Ironically, at a time when this exception is rarely a barrier to federal jurisdiction,[14] other barriers, procedural in nature, have taken its place.

II. Procedural Barriers to Federal Jurisdiction

Currently, the most important procedural barriers to federal jurisdiction are created by the doctrines of standing and comity, or exhaustion, as they interact with res judicata and collateral estoppel. Standing governs the question of who may bring a lawsuit and for what claims. Principles of comity, especially as they have developed within the parameters of "our federalism" beginning with *Younger v. Harris*[15] and continuing through a series of cases in the 1970s,[16] affect the timing of federal litigation. Comity determines whether a federal court may or should entertain a lawsuit even when the plaintiff has standing.

A. *"Our Federalism"*

Although at one time it was widely held that a litigant had the right to choose the forum in which to litigate federal questions and that the federal court's duty was to respect that choice except in narrowly tailored circumstances, this rule is clearly not the vision of the Burger Court. As Justice Stewart recently stated for the Court, it is simply inaccurate to say "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal court, regardless of the posture in which the federal claim arises."[17]

In the 1960s, lawyers in the civil rights movement were occasionally successful in getting federal courts to abort pending state criminal proceedings.[18] *Younger v.*

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13. The Supreme Court continues to recognize "the limited application of federal law in the field of domestic relations." Ridgway v. Ridgway, 454 U.S. 46, 54 (1981). But the limitation of which the Supreme Court currently speaks is a substantive limitation. Thus, as a matter of substantive law, because of the special interest states have in the domestic relations area, "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)). See also McCarty v. McCarty, 453 U.S. 210 (1981). Even Justice Rehnquist, albeit somewhat grudgingly perhaps, has acknowledged that deference to states in this area does not mean that "the Court should blink at clear constitutional violations in state statutes." Santosky v. Kramer, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting).

14. Some courts still use the exception as a barrier. *See, e.g.*, Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975). *But see* Judge Gibbons' dissenting opinion in Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135, 172–73 (3d Cir. 1981) (en banc), arguing that *Solomon* has been overruled by *Lehman*.

15. 401 U.S. 37, 44 (1971).

16. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977) (predicating federal court jurisdiction upon inadequate state court remedies and thereby extending *Younger* to cases which touch upon important state policies); Juidice v. Vail, 430 U.S. 327 (1977) (applying *Younger* to enforcement of contempt proceeding unrelated to criminal statutes); Hicks v. Miranda, 422 U.S. 332 (1975) (applying *Younger* principles to state civil proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying *Younger* to civil proceedings which are in aid of and closely related to criminal statutes); Perez v. Ledesma, 401 U.S. 82 (1971) (no direct appeal allowed from district court to Supreme Court); Samuels v. Mackell, 401 U.S. 66 (1971) (denying federal injunctive relief because some principles governed in state proceeding).

17. Allen v. McCurry, 449 U.S. 90, 103 (1980).

18. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), *aff'd*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

Harris[19] curtailed this trend. *Younger* holds that principles of equity and comity mandate that federal courts dismiss federal actions that challenge state criminal statutes if there are state proceedings pending, unless the state proceedings were brought in bad faith to harrass the federal plaintiffs or unless the state statute is "'flagrantly and patently [unconstitutional] . . . in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'"[20]

Indeed, the cases which have followed *Younger* have gone so far that the 1960s seem like ancient history with respect to the role of federal courts as an available forum for litigants wishing to bring federal claims. Parents and children challenging state laws and practices which result in involuntary separation and termination of parental rights face significant hurdles erected by the progeny of *Younger*.

Although the *Younger* abstention doctrine was initially applied only to criminal cases, in *Huffman v. Pursue, Ltd.*[21] the Court extended *Younger* to civil cases. This development did more than just broaden *Younger*'s application. Initially, *Younger* only delayed federal litigation. If criminal defendants could not obtain federal review before state trial, at least they could obtain it afterwards through federal habeas corpus. In contrast, applying *Younger* to civil cases may mean that lower federal courts are prohibited from ever determining the constitutionality of a myriad of state laws and practices. This prospect became evident with respect to federal challenges to child protection laws when, in *Moore v. Sims,*[22] the Supreme Court extended *Younger* by requiring federal courts to abstain when state child protective proceedings are under way.

The events behind *Moore v. Sims*[23] began on March 25, 1976, when a Texas child protective agency was notified that one of the Simses' children was a possible victim of child abuse. A caseworker for the agency promptly went to the elementary school that the child attended and took summary possession of the child and his two siblings. The next day the agency filed a "Suit for the Protection of a Child in an Emergency" in the juvenile court. The court thereupon issued a ten-day order placing the children in the temporary custody of the agency. The request and order were made *ex parte;* the Simses had no notice of the proceeding.[24]

On March 31, five days after the *ex parte* removal order, the Simses filed a petition in the juvenile court for a writ of habeas corpus.[25] No hearing was held on the writ until April 5, eleven days after the removal. At that time, however, the court did not address the merits of the dispute; instead it ruled that venue was improperly laid,

19. 401 U.S. 37 (1971).

20. *Id.* at 53–54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

21. 420 U.S. 592 (1975).

22. 442 U.S. 415 (1979).

23. The basic facts are set forth in Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1183–85 (S.D. Tex. 1977) (three-judge court), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979).

24. *Id.* at 1183–84.

25. The parents also attempted to file a motion to modify the emergency order, but the motion was returned to them. *See* Moore v. Sims, 442 U.S. 415, 420 (1979).

transferred the matter to the county of the children's residence, and issued a second temporary order *ex parte* keeping the children in custody for another ten days.[26]

On April 19, 1976, the Simses filed suit in the United States District Court seeking declaratory, injunctive, and monetary relief and the return of their children. After conducting an evidentiary hearing on May 5, the federal district court found that the children were not in the legal custody of the agency since the *ex parte* order of April 5 had expired under state law on April 15. Accordingly, the federal court ordered that the children be returned to their parents. The court did not, however, enjoin the agency from filing an action under state law to establish properly temporary conservatorship over the children.[27] On May 14 a "Suit Affecting the Parent-Child Relationship" was filed in juvenile court concerning one child only. On May 21, the federal court changed its mind and temporarily enjoined the juvenile court from proceeding in the state action. Subsequently, a statutory three-judge court extended the restraining order and enjoined any further state proceedings pending the outcome of the federal case.[28]

After a full hearing on the merits, the district court held that the emergency removal scheme was unconstitutional in several respects.[29] In particular, the court declared that the emergency removal procedures were unconstitutional insofar as they failed to require that a post-removal hearing to test the legality of the removal be held "immediately."[30] The court also held that the children's removal for the two ten-day periods without a hearing was unconstitutional, that placing the burden on the parents to seek a hearing after ten days was unconstitutional, that after the hearing the state must make a finding that continued custody is necessary to protect the child from physical danger, and that, at the hearing on the merits, the state must prove its case by clear and convincing evidence.[31]

Perhaps hostile to the substantive conclusions of the three-judge court,[32] and certainly apprehensive about the specter of federal courts rewriting state child neglect and termination of parental rights schemes, the Supreme Court reversed the lower

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26. *Id.* at 420–21.

27. *Id.* at 421–22.

28. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1185 (S.D. Tex. 1977). The three-judge court was convened pursuant to the controlling federal statutes, 28 U.S.C. §§ 2281, 2284. *Id.* at 1183.

29. With respect to the preliminary investigative powers of the state to ascertain the veracity of charges of child abuse before any judicial relief is sought, the court found that three aspects of the scheme violated minimal constitutional guarantees. First, authorizing psychological or psychiatric examinations of children suspected of being abused without notice to the parents and a showing that such examinations are necessary is an unconstitutional invasion of the privacy of the family unit. *Id.* at 1191. Second, the broad prohibition against disclosure to parents of child abuse reports violated due process. The court ruled that "[a] state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding." *Id.* Third, the court ruled that the use of a central registry for gathering and disseminating allegations of child abuse was unconstitutionally effected. *Id.* at 1192.

30. *Id.* at 1193. The court also declared the purpose of the hearing to be unconstitutional because the hearing was merely to provide for the temporary care or protection of the child, although it regarded this to be merely a legislative oversight. The illegality arose from the assumption that care or protection was needed. *Id.*

31. *Id.* at 1193–94. Finally, the court ruled that children must be afforded counsel at these emergency hearings. *Id.* at 1195.

32. *See* Chayes, *The Supreme Court, 1981 Term, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22–26 (1982).

court.[33] In so doing the court did not reach the substantive issues raised by the lawsuit. Instead, the Court held that it was error for the district court to have heard the case and reached the merits. Relying on *Younger* and its progeny,[34] the Court ruled that the federal court should have abstained from interfering with ongoing state proceedings.[35]

The Supreme Court's application of the *Younger* abstention doctrine to the facts of *Sims* underscores the difficulty of obtaining federal relief from unconstitutional child protective schemes. *Younger* initially required abstention only when the pending state court proceedings provided the federal plaintiff with a full and fair opportunity to vindicate his or her federal rights. This prerequisite arose out of *Douglas v. City of Jeannette*[36] and *Dombrowski v. Pfister*.[37] Although *Younger*, more than *Douglas*, frankly recognizes the federalism and comity principles which underlie abstention, the doctrinal framework for the rule remains, as it was in *Douglas*, equity. So long as the federal litigant has an adequate remedy at law, the federal court will not exercise its equity jurisdiction and stay ongoing state proceedings.[38]

It is plain that the Simses as federal plaintiffs did not have an adequate remedy at law since as state court defendants they did not have the opportunity to litigate each of the federal claims they later raised in the federal court. While the Simses made a multifaceted attack on Texas' child protective scheme, the thrust of their attack was directed at actions which had already taken place by the time the federal complaint was filed and which were not part of the pending state child abuse proceedings. The federal complaint challenged two broad aspects of the state scheme: those procedures related to the emergency removal of children[39] and those procedures related to proving abuse. Although these issues could have been raised when the Simses defended the state charges on the merits and thus could properly have been barred by traditional application of *Younger* abstention,[40] the emergency removal questions clearly were not part of any ongoing state procedures.

In applying *Younger* abstention, the Court in *Sims* recognized that several of the federal claims could not have been raised as defenses to the state charges[41] and

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33. Moore v. Sims, 442 U.S. 415, 418 (1979).

34. See cases cited *supra* note 16.

35. 442 U.S. 415, 423 (1979).

36. 319 U.S. 157 (1943).

37. 380 U.S. 479 (1965).

38. *See* Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943). It should be noted that the rules for invoking equity jurisdiction were fashioned in a unitary judicial system, not a dual system such as the federal-state system. It is questionable whether principles of equity are properly invoked when the result is to bar access to a federal court in circumstances in which Congress has conferred jurisdiction. *See* HART & WECHSLER, *supra* note 1, at 728–30; *see also* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1106–08 (1977).

39. Among the alleged defects in the procedure for removing the children were the absence of a requirement for an *ex parte* hearing immediately after a child is taken into custody; the holding of a removal hearing without notice to the parents; the failure to hold a full adversary hearing upon the expiration of the ten-day *ex parte* removal order; the failure to make child abuse records available to parents at the investigatory stage; and the procedures by which child abuse reports are gathered, stored, and disseminated in the statewide child abuse computer linkup.

40. *See* Moore v. Sims, 442 U.S. 415, 443 (1979) (Stevens, J., dissenting).

41. The view that *Younger* is applicable only where the federal claims may easily be raised as defenses to those state charges can be traced to *Younger* itself. *See* 401 U.S. 37, 46 (1971). *See also* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975); Steffel v. Thompson, 415 U.S. 452, 462–63 (1974).

fashioned a new test for abstention questions which greatly expanded the original purpose of abstention. When the federal claims "could have been raised in the pending state proceedings,"[42] the federal court should abstain, even if the issues may only be raised as permissible counterclaims.[43] Moreover, federal plaintiffs bear the burden of proving their inability to raise the claims in the state court. "[U]nless state law clearly bars the interposition of the constitutional claims," federal courts are to presume that abstention is appropriate.[44]

Moore v. Sims stands as a major barrier to federal litigation of child protective schemes by plaintiffs who are, or are about to become, defendants in ongoing state court proceedings.[45] If parents may not seek federal court review of state statutes while they are parties to ongoing state proceedings, only two possible times to do so remain. The key to securing a federal forum to challenge child protective schemes is to be found, if at all, by filing the federal action either before state proceedings have commenced or after they are fully exhausted. Yet both of these choices contain other procedural barriers.

B. *Habeas Corpus*

Once state proceedings are complete, seeking a writ of habeas corpus provides a possible avenue for federal court review. But in *Lehman v. Lycoming County Children's Services Agency*[46] the Supreme Court limited the writ's application in child custody cases. *Lehman,* like *Sims,* involved a federal challenge to the constitutionality of a state child protective scheme. There the similarity stops. While *Sims* was an anticipatory attack, *Lehman* was not brought in federal court until all state court proceedings had been fully exhausted.[47]

The facts in *Lehman* can be outlined simply.[48] In 1971 Marjorie Lehman voluntarily placed her three sons in temporary foster care with the Lycoming County

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42. Moore v. Sims, 442 U.S. 415, 425 (1979).

43. *Id.* at 425 & n.9. Though the issue may be raised, in Texas procedural due process claims become moot by the time an adjudicatory hearing is held. *See* Coleman v. Texas State Dep't of Pub. Welfare, 562 S.W.2d 554 (Tex. Civ. App. 1978).

44. Moore v. Sims, 442 U.S. 415, 425–26 (1979).

45. In Hicks v. Miranda, 422 U.S. 332 (1975), the Supreme Court expanded *Younger* to require dismissal of federal actions which were begun prior to state proceedings when those state proceedings are commenced "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." *Id.* at 349. The rule of *Hicks* thus allows state prosecutors to effect a reverse removal by answering the federal complaint with a state complaint.

Even in the face of *Sims,* district courts occasionally permit some aspects of a lawsuit to proceed in federal court when state court child protective proceedings are in progress. By reading the complaint carefully and determining precisely what issues are not involved in the state proceedings, a court may refuse to abstain or dismiss the entire federal action once it concludes that some of the federal claims are not germane to the state action. *See, e.g.*, Brown v. Jones, 473 F. Supp. 439 (N.D. Tex. 1979). These issues may include procedures relating to emergency removal of children, once the removal has occurred and is not part of the state action. *Id.* at 448–53.

46. 458 U.S. 502 (1982). The author was one of the attorneys for Lehman throughout the federal court proceedings, including the first writ of certiorari in the Supreme Court seeking review of the Pennsylvania Supreme Court order.

47. *Id.* at 504–05.

48. The facts stated in the text are from the Brief for Petitioners in the Supreme Court. The facts are also detailed in *In re* William L., 477 Pa. 322, 383 A.2d 1228 (1978), and Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135 (3d Cir. 1981) (en banc). For a thorough discussion of *Lehman,* see Note, *No Federal Habeas Corpus in Child Custody Disputes:* Lehman v. Lycoming County Children's Services Agency, 22 J. FAM. L. 129 (1983).

Children's Services Agency because of housing and other problems that developed while she was pregnant with a daughter, Tracie. She was supported by Social Security, public assistance grants, and food stamps. Until that time, the children had been under Ms. Lehman's exclusive and continuous care and supervision. No report or adjudication of parental neglect had ever been made, and the record does not suggest that her sons had ever been neglected or mistreated while they were in her custody.[49]

In 1974, after her sons were in foster care for more than three years, Lehman requested their return. The agency refused on the basis that the mother could not provide her sons with adequate care. Instead, the agency filed a petition to terminate her parental rights in her three sons but not in her daughter.[50] At the conclusion of the hearing the Court made several findings and conclusions. Because of her income Lehman found it necessary to live in a low income housing project, where, in the words of the court of common pleas, "'the demands upon a parent in properly supervising and disciplining his children are most extreme,'"[51] and by reason of Lehman's "very limited social and intellectual development combined with her five-year separation from the children, [she] is incapable of providing minimal care, control and supervision for the three children [and] her incapacity cannot and will not be remedied. . . . [T]he best interests of the children" would dictate that they remain in agency custody indefinitely.[52]

The court made no finding that Lehman had ever neglected or abused any of her children. Nevertheless, the court permanently terminated parental rights based upon a Pennsylvania statute which allows termination to be ordered on the grounds that

> [t]he repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.[53]

The mother's constitutional challenge to this law was rejected by the trial court. After the final order of the trial court, an appeal was brought to the Pennsylvania Supreme Court where Lehman argued that a construction of the Pennsylvania statute which authorized the destruction of a family in the absence of proof that she had failed to provide adequate child care in the past or that her sons would be exposed to serious and substantial harm in the future was violative of the fourteenth amendment. It was further argued that the Pennsylvania statute's definition of parental incapacity as "incapacity [which] has caused the child to be without essential care, control or mental well-being" is impermissibly vague both on its face and as applied.[54]

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49. Brief for Petitioners at 7–8.

50. *Id.* at 9–10.

51. *Id.* at 13 (quoting Findings, Discussion and Order of the Court of Common Pleas, at 3).

52. *Id.* at 13–14 (quoting Findings, Discussion and Order of the Court of Common Pleas, at 4).

53. Adoption Act of 1970, No. 208, § 311(2), 1970 Pa. Laws 623–24 (repealed 1980; current version, identical except for punctuation, at 23 PA. CONS. STAT. ANN. § 2511(2) (Purdon Supp. 1983–1984)).

54. Brief for Petitioners at 15.

With two justices dissenting, the Pennsylvania Supreme Court affirmed the termination order remarking that "parental incapacity does not involve parental misconduct."[55] The majority held that the legislature's power to protect the physical and emotional needs of children authorized termination even in the absence of serious harm or risk of serious harm to the children and even in the absence of any parental misconduct. The court also held that the statute was not unconstitutionally vague either on its face or as applied.[56] Timely review was sought in the United States Supreme Court by writ of certiorari. The Court denied the petition with three justices dissenting.[57]

Thereafter, the mother filed a petition for a writ of habeas corpus in federal district court on January 16, 1979, seeking (a) a declaration that the Pennsylvania statute was unconstitutional, (b) a declaration that she was the legal parent of the children, and (c) an order releasing the children to her custody within sixty days unless an appropriate state court determined that the best interests of the children required that temporary custody remain with the state.[58]

The district court dismissed the petition without a hearing in an unreported opinion. Relying primarily on *Sylvander v. New England Home for Little Wanderers*,[59] the court ruled that the children's custody "is not that type of custody to which the federal habeas corpus remedy may be addressed."[60] Although a divided panel of the Third Circuit reversed the district court,[61] after reargument, the Third Circuit en banc affirmed the district court's order of dismissal by a vote of six to four.[62]

The Supreme Court affirmed the judgment of the Third Circuit, ruling that federal habeas corpus is ordinarily unavailable to challenge the custody of children pursuant to a state court judgment terminating parental rights.[63] The Court held that the Lehman children were not "in custody" within the meaning of the federal habeas corpus statutes since children in the custody of foster parents "suffer no unusual restraints not imposed on other children."[64]

The weakest aspect of the reasoning in *Lehman* is the restrictive interpretation given to the word "custody." The Court had previously defined custody broadly in order to maximize the availability of habeas corpus to persons whose liberty had been

55. *In re* William L., 477 Pa. 322, 383 A.2d 1228 (1978).

56. *Id.* at 335–40, 383 A.2d 1228, 1234–37.

57. Lehman v. Lycoming County Children's Servs. Agency, 439 U.S. 880 (1978). The dissenters were Justices Brennan, White, and Marshall.

58. Lehman v. Lycoming County Children's Servs. Agency, No. 79–65 (M.D. Pa. Sept. 4, 1979).

59. 584 F.2d 1103 (1st Cir. 1978).

60. Lehman v. Lycoming County Children's Servs. Agency, No. 79-65, slip op. at 8 (M.D. Pa. Sept. 4, 1979).

61. Lehman v. Lycoming County Children's Servs. Agency, No. 79-2466 (3d Cir. July 23, 1980), *vacated and reh'g granted* (Aug. 15, 1980).

62. Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135 (3rd Cir. 1981) (en banc), *aff'd*, 458 U.S. 502 (1982).

63. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982).

64. *Id.* at 510–12.

unconstitutionally restricted.[65] For example, in *Jones v. Cunningham*[66] the Court ruled that the state exerted sufficient restraint on the physical freedom of a parolee to warrant habeas corpus review, reasoning that the writ is available whenever "there are . . . restraints on a man's liberty, restraints not shared by the public generally, which would have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."[67] Furthermore, in *Hensley v. Municipal Court*[68] the Court ruled that a person free on his own recognizance awaiting execution of a future sentence was in custody for the purpose of federal habeas corpus review.[69]

As early as 1885, the Court discussed the custody requirement, in terms that foreshadow *Jones,* as a restraint "not shared by the public generally."[70] It is plain that only a parsimonious interpretation would exclude children who, as wards of the state, are restricted by complete state control over where they live, whether they may marry, enroll in the armed forces, or obtain medical, psychiatric, or surgical treatment.[71]

Nonetheless, the decision in *Lehman* is not clearly wrong. Sound policy reasons support finality in, and prompt resolution of, child custody disputes. Although the majority had to overcome the major hurdle of the broad imprimatur given to the word "custody," congressional intent is unclear.[72] While the language arguably is broad enough to include the claim in *Lehman,* Congress certainly did not contemplate this particular claim in drafting the statute. Unfortunately, the Court based its decision on

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65. When Congress dramatically expanded statutory federal habeas corpus in 1867, the language used was:

> [T]he several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any *person* may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .

Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385–86 (emphasis supplied). This statute has survived to today with only minor changes. However, in the codification of statutes in 1871, the word "person" emphasized above changed to "prisoner." *See* REV. STAT. § 753 (1875). Since that time, the federal habeas statute has used the word "prisoner." *See* 28 U.S.C. § 2241(c) (1982). Not a single datum of legislative history makes reference to this change. Accordingly, the conclusion is inescapable that the change "is due to the apparently unnoticed handiwork of the compiler of the revised statutes." Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31, 35 n.21 (1965).

66. 371 U.S. 236 (1963).

67. *Id.* at 240.

68. 411 U.S. 345 (1973).

69. *Id.* at 349. *See also* Strait v. Laird, 406 U.S. 341 (1972) (unattached, inactive, army reserve duty is "custody" for habeas corpus purposes); Carafas v. LaVallee, 391 U.S. 234 (1968) (unconditional release from prison after serving full sentence nonetheless constitutes being "in custody" for statutory purposes); Peyton v. Rowe, 391 U.S. 54 (1968) (person serving consecutive sentences is "in custody" to challenge any one of them).

Remarkably, the Court suggested in *Lehman* that the term "custody" in § 2254 may be different from "custody" in § 2241. 458 U.S. 502, 508 n.9 (1982).

70. Wales v. Whitney, 114 U.S. 564, 571 (1885).

71. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 520–21 (1982) (Blackmun, J., dissenting).

72. The limited legislative history available, however, seems quite clear. Though little discussion of the Act took place in Congress, Representative Lawrence did explain that the purpose of the bill was "to enlarge the privilege of the writ of *hobeas* [*sic*] *corpus,* and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1865). Among other purposes, the legislation was enacted "to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865). *See* Fay v. Noia, 372 U.S. 391, 416–17 (1963).

policy grounds and federalism concerns. It is Congress' role, not the Court's, to determine the jurisdiction of the federal courts.[73] The Court's role in any jurisdictional dispute is to divine Congress' intent, not to decide the reach of a statute conferring jurisdiction on the basis of the Court's concept of sound policy.

The most problematic aspect of *Lehman* is not the decision itself, but its interplay with *Moore v. Sims*. *Lehman* was strategically brought as an action seeking a writ of habeas corpus rather than a section 1983 action because of the doctrine of res judicata.[74] Not only were the state court proceedings fully exhausted in *Lehman*, but Lehman's counsel had raised all of the federal constitutional issues in the state proceedings.[75] Thus, Lehman would have had no hope of winning a section 1983 action because a timely motion by the defendant would have precluded relitigation of the federal claims.[76] Habeas corpus, however, is a major exception to the doctrine of res judicata since it "allows relitigation of a final state-court judgment disposing of precisely the same claims."[77] Thus, habeas corpus was Lehman's only hope.

Lehman is an important case not because it bars federal review of child protective schemes by habeas corpus but because, in combination with *Sims*, it potentially bars all lower federal court review.

Because of the relative infancy of the development of substantive and procedural constitutional protections in the area of state initiated child protection, the federal courts can play a significant role in contributing to federal constitutional analysis.[78] It would be unfortunate if the Supreme Court were the only federal court to have the opportunity to develop constitutional norms in this area.

Clearly, it is impossible for the Court adequately to oversee errors committed by lower courts. Courts and commentators have long recognized that the Court has an overburdened docket.[79] Disproportionate expenditure of scarce resources in one particular substantive area of the law entails great costs. Justice Stevens has observed:

> In light of the ever-increasing number of petitions for certiorari and the severe practical constraints on our ability freely to grant certiorari, it is certainly safe to assume that whenever we grant certiorari in a case not deserving plenary review, we increase the likelihood that certiorari will be denied in other, more deserving, cases.[80]

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73. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

74. *See infra* notes 84–111 and accompanying text.

75. *See In re* William L., 477 Pa. 322, 383 A.2d 1228 (1978).

76. *See* FED. R. CIV. P. 8(c). The affirmative defense of res judicata is waivable. FED. R. CIV. P. 12(b). Even in the Third Circuit, which adheres to the liberal rule allowing relitigation of claims in § 1983 actions which could have been but were not raised in previous state court proceedings, Lehman would have been barred from relitigation because she had raised all of her federal claims throughout the state court proceedings. *See* New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).

77. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 512 (1982).

78. *See generally* Cover & Aleinikoff, *Dialectual Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

79. *See, e.g.*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 38–51 (5th ed. 1978). As Justice Stevens has said, it would be incorrect to "infer that we have more than enough time to dispatch our more important business." Great W. Sugar Co. v. Nelson, 442 U.S. 92, 94 (1979) (per curiam) (Stevens, J., dissenting).

80. Watt v. Alaska, 451 U.S. 259, 274 n.1 (1981) (Stevens, J., concurring). Justice Stevens has also pointed out the inadvisability of any particular issue, even capital punishment, taking up a disproportionate share of the Court's docket. Coleman v. Balkcom, 451 U.S. 949, 949–50 (1981) (concurring in the denial of certiorari). *See also* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415–17 (1964).

Moreover, correction of error in any particular case is not and should not be the primary purpose of the Supreme Court. "A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous it has not fulfilled its purpose."[81]

Nonetheless, the combination of *Sims* and *Lehman* may mean that the Supreme Court's discretionary review by writ of certiorari is the only means by which the constitutionality of state actions that involuntarily separate children from their parents may be brought before a federal court.[82] For reasons wholly unrelated to the merits, such petitions frequently will be denied.[83]

C. *Res Judicata and Collateral Estoppel*

Except in habeas corpus, the capacity to relitigate claims and issues in a second suit is limited by the doctrines of res judicata and collateral estoppel. Res judicata, or claim preclusion, precludes parties from relitigating claims that were or could have been raised in an action that has been decided on the merits.[84] Collateral estoppel, or issue preclusion, renders conclusive for purposes of any subsequent action the determination of all issues of fact or law which were essential to the judgment and actually litigated in an earlier action.[85]

For many years federal courts disagreed over the extent to which, if at all, res judicata and collateral estoppel are applicable to section 1983 cases.[86] The arguments on both sides are strong. Arguments in favor of res judicata stress that finality is important because parties and courts alike are pressured by multiple lawsuits which waste personal and judicial resources.[87] Relitigation also undermines the conclusive character of judgments and increases the risk of unseemly disagreement between courts,[88] which defeats comity between federal and state courts.[89] Moreover, Congress has expressed its preference for finality by enacting the full faith and credit statute.[90]

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81. Address by Chief Justice Vinson, American Bar Association (Sept. 7, 1949), *reprinted in* R. STERN & E. GRESSMAN, *supra* note 79, at 467–68. *See also* SUP. CT. R. 17.1.

82. Challenges to the facial validity of state statutes on federal constitutional grounds which have been rejected by state courts may be reviewed as of right in the Supreme Court by appeal. *See* 28 U.S.C. § 1257(2) (1982). However, a host of claims, including applied illegality of a state scheme or unfairness of process in the state proceeding—whether due to the absence of counsel or some other defect—may be brought to the Supreme Court only by writ of certiorari. *See id.* § 1257(3).

83. *See, e.g.*, Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1014 (1978) (White, J., dissenting). According to Justice White, many cases are denied review, not because they do not deserve review, but simply because the Court is "performing at [its] full capacity, *i.e.*, [it is] now extending plenary review to as many cases as [it] can adequately consider, decide and explain by full opinion." *Id.* at 1023.

84. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

85. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

86. *See generally* Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1330–54 (1977).

87. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. 147, 153–54 (1979)); Hoag v. New Jersey, 356 U.S. 464, 470 (1958).

88. *See* Reed v. Allen, 286 U.S. 191 (1932).

89. *See* Allen v. McCurry, 449 U.S. 90, 95–96 (1980).

90. 28 U.S.C. § 1738 (1982). *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 n.6 (1982).

On the other hand, res judicata, when applied fully in civil rights cases, frustrates Congress' desire that the federal courts be the primary guardian of federal rights. In 1972, in *Mitchum v. Foster*[91] the Supreme Court described Congress' intention when it created section 1983:

> Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."[92]

The preservation of a federal forum for plaintiffs who wish to bring to it federal issues but who involuntarily became state defendants requires either permitting relitigation of claims pressed in the state court or permitting plaintiffs to raise their federal claims for the first time in federal court after having failed to raise them in state court.

In 1980, in *Allen v. McCurry*[93] the Supreme Court partially settled the dispute over the applicability of collateral estoppel in section 1983 actions. McCurry was convicted in a Missouri state court of possession of heroin and assault with intent to kill on the basis of evidence seized in his house by police officers. McCurry moved in state court to suppress all of the evidence seized. At a pretrial hearing, the state court suppressed some of the seized evidence but admitted evidence seized in plain view. After conviction, McCurry brought suit in federal court under section 1983 against two police officers, claiming that they entered his house in violation of the fourth amendment.[94]

The Supreme Court ruled that collateral estoppel barred relitigation of the issue of the legality of the policemen's entry because the state court had provided McCurry with "fair procedures for the litigation of constitutional claims."[95] The importance of the holding in *Allen* cannot be overemphasized. Against the claim that section 1983 was an exception to the full faith and credit statute or to the principles of collateral estoppel, the Supreme Court clearly held that these principles are applicable to involuntary state court defendants.[96] The Court squarely rejected the claim that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."[97] Thus, even though McCurry was barred by the doctrine of *Stone v. Powell*[98] from relitigating the constitutionality of the seizure in a habeas corpus proceeding, he was not permitted to relitigate in a section 1983 action.

In *Allen* the Court had no occasion to consider, and specifically reserved the question, whether "a § 1983 plaintiff [may] litigate in federal court a federal issue

91. 407 U.S. 225 (1970).
92. *Id.* at 242 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).
93. 449 U.S. 90 (1980).
94. *Id.* at 92.
95. *Id.* at 101.
96. *Id.* at 105.
97. *Id.* at 103.
98. 428 U.S. 465 (1976).

which he could have raised but did not raise in an earlier state-court suit against the same adverse party."[99] That question was answered in *Haring v. Prosise*.[100]

In *Prosise* the Court unanimously held that a defendant who pleads guilty in a state criminal action may subsequently bring in federal court a section 1983 damages action alleging that police officers unconstitutionally searched his apartment. Prosise had not moved in state court to suppress any of the evidence seized.[101] Accordingly, the federal court did not have to contend with previous findings of fact or conclusions of law.

The police officers argued that Prosise should be barred from federal court because he had had an opportunity to raise the federal issue in the state court proceeding and because his failure to do so constituted a waiver of the federal claim.[102] The Court firmly rejected a federal rule of preclusion which would bar the assertion of constitutional claims that have never been but could have been litigated. Because such a rule "would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights," the Court permitted Prosise to litigate his fourth amendment claim in federal court.[103]

Prosise leaves important issues unresolved. In *Prosise* the Supreme Court recognized that under Virginia law the guilty plea would not bar subsequent litigation of the legality of the search.[104] For this reason *Prosise* was an easy case since the federal full faith and credit statute requires the second forum to give only so much effect to the first forum's judgment as the rendering forum would give.

Allen v. McCurry holds that a litigant is collaterally estopped from asserting claims that were decided in earlier litigation in which the litigant had a full and fair opportunity to be heard. After *Prosise*, if the issue was not litigated and was not necessary to the first judgment,[105] subsequent litigation is permitted. The interplay of *Lehman, Allen,* and *Prosise* may result in the following situation. If parents fully litigate their federal claims in state court proceedings, they will be barred from relitigating them in federal court. But, if they fail to raise their federal claims in state court, they may be allowed to press them in a subsequent federal proceeding.

Yet *Prosise* provides only partial support for this proposition. It remains unclear whether claim preclusion applies in section 1983 actions to foreclose litigation of federal claims that could have been, but were not, presented in a prior state court action when the purpose of the second action is to attack collaterally or to vitiate the effects of the original judgment. *Prosise* does not answer this question for two reasons. First, the Court clearly held that Prosise would not be barred from relitigation even in Virginia. Therefore, res judicata presented no bar in the case.[106] Any-

99. 449 U.S. 90, 97 n.10 (1980).
100. 103 S. Ct. 2368 (1983).
101. *Id.* at 2372 n.2.
102. *Id.* at 2375.
103. *Id.* at 2378.
104. *Id.* at 2373–75.
105. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
106. For the same reason the full faith and credit statute was not a bar. *See* Allen v. McCurry, 449 U.S. 90, 97 (1980).

thing further said in the case is dictum. Second, although the Court permitted litigation of a federal claim that could have been raised in the state court, the relief sought in the federal court would not undermine the state court action. Even if Prosise obtained damages in federal court, no conflict would exist between the state court conviction and the damages claim.

Most recently, in *Migra v. Warren City School District Board of Education,*[107] the Court answered the question expressly left open in *Allen* and held that a state court judgment will be given the same preclusive effect in a section 1983 action as it would under the law of the state in which the judgment was rendered even when the litigant did not raise the federal claim in the state court action.[108] In a short and confusing opinion, the Court reasoned that *Allen* foreclosed the question whether claim splitting would be permissible.

> Any distrust of state courts that would justify a limitation on the preclusive effect of state judgments in § 1983 suits would presumably apply equally to issues that actually were decided in a state-court as well as to those that could have been. . . . Having rejected in *Allen* the view that state-court judgments have no issue preclusive effect in § 1983 suits, we must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case.[109]

The reasoning in *Migra* is erroneous. *Allen* concerned collateral estoppel. Many sound reasons support full application of the doctrine of collateral estoppel in our federal system, precluding relitigation of issues fully and fairly litigated once and lost. Relitigation not only imposes high costs through vexatious litigation and wasted legal resources, it also impairs the principle of comity. Relitigation allows the federal court to rule that the state court erred. This result is tolerated in habeas corpus only because of the high value Congress has placed on liberty. If a federal plaintiff freely and purposely asked a state court to decide a federal claim, the claim is barred in federal court once the litigant loses in the state action. This doctrine merely recognizes that a party gets only one opportunity to litigate a federal claim. But *Allen* is not precedent for applying res judicata to a federal plaintiff who chose not to litigate the federal claim in state court.

If there remains any possibility that *Migra* does not completely prohibit claim splitting, it must be found in the facts of *Migra* itself. In *Migra* the federal plaintiff previously had been a state court plaintiff. She deliberately chose not to raise her federal claims in the state court action. As applied to a case like *Migra*, the *Allen* holding does not bar certain claims from federal court. The ruling simply puts litigants on notice that if they wish to sue in federal court at all they should do so before, or perhaps simultaneously with, filing a state complaint.[110]

It remains to be considered whether, after *Prosise* and *Migra*, an involuntary state court defendant can reserve or fail to raise federal claims in the state court when those claims, if successful and if raised as defenses, would necessarily result in

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107. 104 S. Ct. 892 (1984).
108. *Id.* at 898.
109. *Id.* at 897–98.
110. *See* Board of Regents v. Tomanio, 446 U.S. 478, 497 n.6 (1980) (Brennan, J., dissenting).

winning the case. As the Supreme Court recognized in *Prosise*, "additional exceptions to collateral estoppel may be warranted in § 1983 actions" if federal courts are to play the role envisioned by Congress of protecting federal rights.[111] At the end of this Article these possible exceptions will be considered. The next section explores barriers to federal litigation before state proceedings have been initiated.

D. *Standing and Ripeness*

Younger provides no bar to federal litigation when no state proceedings are in progress. The Supreme Court ruled in *Monroe v. Pape*[112] that section 1983 is a supplemental remedy available to federal plaintiffs regardless of whether they can obtain full redress in state courts.[113] *Younger* may be applicable if state court proceedings are commenced "after [a] federal complaint is filed, but before any proceedings of substance on the merits have taken place."[114] In the total absence of state court proceedings, however, *Younger* is inapplicable. In addition, so long as the challenge is not to an unclear state law, which requires a *Pullman* abstention,[115] abstention will not be invoked to delay or avoid federal relief.

Prospective relief generally is available so that a citizen will not be forced to choose between risking arrest or obeying the law and foregoing constitutionally protected activity.[116] Federal courts, as primary guardians of federal rights, are available to grant declaratory and prospective relief,[117] though not everyone is entitled to seek declaratory relief.

Standing creates a barrier to federal court review before state court proceedings have commenced. The rules of standing require that the plaintiff have a "personal stake" in the outcome of a lawsuit.[118] Without this stake, no case or controversy exists within the meaning of article III. Although all parents may have an interest in constitutionally written and implemented child protection or termination of parental rights schemes, it is plain that merely being a parent is insufficient to give a plaintiff a personal stake in the outcome of a lawsuit challenging such schemes. Parents *qua* parents have no capacity to demonstrate that they are immediately in danger of sustaining some direct injury as the result of the challenged official conduct and that the injury or threat of injury is both real and immediate.[119] Taxpayers fare no better;

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111. Haring v. Prosise, 103 S. Ct. 2368, 2373 (1983) (relying on Allen v. McCurry, 449 U.S. 90 (1980), and Board of Regents v. Tomanio, 446 U.S. 478 (1980)).

112. 365 U.S. 167 (1961).

113. This is true even if others with interests similar to those of the federal plaintiffs are involved in litigation in state courts at the time the federal action is brought. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). Even where the federal plaintiff is threatened with suit, *Younger* does not require abstention where there is no pending state action. Wooley v. Maynard, 430 U.S. 705 (1977); Steffel v. Thompson, 415 U.S. 452 (1974).

114. Hicks v. Miranda, 422 U.S. 332, 349 (1975).

115. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

116. *See* Steffel v. Thompson, 415 U.S. 452, 463 n.12 (1974). In Justice Brennan's words, the dilemma is to avoid placing "the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Id.* at 462.

117. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241 (1967).

118. Baker v. Carr, 369 U.S. 186, 204 (1962).

119. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1665 (1983).

there is no "nexus" between their interest in the problem as taxpayers and successfully challenging a child protective scheme.[120]

In order to seek declaratory relief, the plaintiff must possess an objective fear of arrest or harmful state action;[121] it may not be "subjective," "chimerical,"[122] or "imaginary or speculative."[123] Moreover, a federal suit seeking prospective relief must "[present] 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"[124]

Last term, the Supreme Court decided *City of Los Angeles v. Lyons*,[125] which places further restrictions on plaintiffs seeking prospective relief. In October 1976, Lyons was stopped by police officers for a traffic violation. Although he offered no resistance or threat whatsoever, the officers seized him and applied a choke hold which rendered him unconscious and damaged his larynx.[126] In 1977, Lyons brought a section 1983 action in federal court seeking damages, and declaratory and injunctive relief. The injunction sought would have prohibited the use of choke holds by the police. The Supreme Court ruled that although Lyons properly could press his damages action, he lacked article III standing to seek prospective relief in federal court.[127]

The Court's holding was based on its conclusion that Lyons failed to show a sufficient likelihood that he would ever be choked illegally again.[128] The Court remarked: "If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October, 1976, then he has not met the requirements for seeking an injunction in a federal court . . . ."[129] The events that would have had to occur in the future to subject Lyons again to illegal police conduct were deemed by the Court to be too speculative. Lyons would not only have to be stopped again by the police for a traffic infraction (something even the Supreme Court did not regard as too speculative), in addition, Lyons would have to be choked again. The Court found that possibility too unlikely.[130] To make this "incredible assertion," Lyons would have to show either "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or, (2) that the City ordered or author-

120. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Flast v. Cohen, 392 U.S. 83, 102 (1968).

121. *See* Steffel v. Thompson, 415 U.S. 452, 476 (1974) (Stewart, J., concurring).

122. Poe v. Ullman, 367 U.S. 497, 508 (1961).

123. Younger v. Harris, 401 U.S. 37, 42 (1971).

124. Steffel v. Thompson, 415 U.S. 452, 460 (1974) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

125. 103 S. Ct. 1660 (1983).

126. As Justice Marshall described it in dissent, "[w]hen Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released." *Id.* at 1672.

127. In a related way, *Lyons* can be viewed as a ripeness case. The Court ruled that "abstract injury is not enough"; a federal plaintiff must show a threat of injury which is not "conjectural" or "hypothetical." *Id.* at 1665 (citing, among other cases, United Pub. Workers v. Mitchell, 330 U.S. 75, 89–91 (1947), a leading ripeness case).

128. *Id.* at 1668.

129. *Id.* at 1668–69.

130. *Id.* at 1667–68.

ized police officers to act in such manner."[131] A strong argument can be made, and indeed was made by the dissent, that Lyons alleged that the city authorized police officers to act in such manner.[132] Nonetheless, Lyons' claim was held to be speculative.

Lyons is likely to have a devastating effect on federal litigants seeking prospective relief based on past illegality. Even when plaintiffs have demonstrated a sufficient threshold of harm to meet the jurisdictional minimum, their cases may be dismissed for lack of standing on prudential grounds when it can only be speculated that the relief sought would help them in any way.[133]

III. Possible Ways Out: Alternatives to Federal Court After State Proceedings Are Completed

A. Wooley v. Maynard

In *Wooley v. Maynard*[134] George and Maxine Maynard, Jehovah's Witnesses, had been convicted in state court on three different occasions for violating a New Hampshire motor vehicle law requiring the display of the words "Live Free or Die" on all license plates. George Maynard never appealed any of his convictions. Instead, after serving a brief sentence he challenged the constitutionality of the law in a section 1983 action in federal court. The Supreme Court permitted the suit to go forward and declared the state law unconstitutional as applied.[135]

It is important to emphasize that Maynard did not try to relitigate in federal court the validity of his convictions. In all probability collateral attack on his state court convictions would have been barred by the doctrine of res judicata, unless the collateral attack had been made pursuant to federal habeas corpus.[136] Maynard's contention, accepted by the Supreme Court, was not that he was unlawfully treated in the past, but only that he would be subject to continuing and future illegality. He sought and obtained prospective relief enjoining the state from arresting and prosecuting him at any time in the future for failure to display the state motto on his license plate.[137]

Maynard stands as a major exception to the general bar against litigating claims a second time. But *Maynard*'s usefulness is circumscribed by the doctrines of standing and ripeness already discussed. *Maynard* differs from *Lyons,* however, in an important way. Maynard easily was able to make a showing that he was entitled to prospective relief. Far from being speculative, his fear of arrest was well-founded,

131. *Id.* at 1667 (emphasis in original).

132. *Id.* at 1675 (Marshall, J., dissenting).

133. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975) (generalized grievances inadequate to give standing); Linda R. S. v. Richard D., 410 U.S. 614 (1973) (private citizen lacks judicially cognizable interest in prosecution of another).

134. 430 U.S. 705 (1977).

135. *Id.* at 713.

136. The federal habeas corpus statute expressly requires full exhaustion of state remedies as a precondition to federal review. 28 U.S.C. § 2254(b)-(c) (1982). Maynard's failure to appeal through the state courts, if considered a "deliberate by-pass," would have barred habeas review. *See* Wainwright v. Sykes, 433 U.S. 72 (1977).

137. 430 U.S. 705, 712 (1977).

for it was based on three recent prior arrests, all of which led to conviction. Unlike Lyons, Maynard did not have to allege future events to prove his grievance against the state of New Hampshire. It was a matter of record that he had refused in the past, and would continue to refuse, to display the motto on his license plate. In addition, the state's determination to prosecute was a matter of record.

B. England v. Louisiana State Board of Medical Examiners

In *Maynard* the failure to raise federal claims in the state courts was probably inadvertent since Maynard was not represented by counsel in state court.[138] Thus, after *Maynard,* the question whether a litigant may purposefully fail to raise federal claims for strategic purposes, expressly hoping to save the federal claims for a federal forum, remains unanswered. This strategy has its origins in *England v. Louisiana State Board of Medical Examiners.*[139] The general rule, as already noted, disfavors claim splitting.[140] Moreover, "[t]he present trend is to see claims in factual terms and to make them coterminous with the transaction regardless of the number of substantive theories."[141]

In *England* graduates of chiropractic schools seeking to practice in Louisiana without complying with the educational requirements of a state statute sued in federal court for an injunction and a declaration of the statute's unconstitutionality as applied to them.[142] The district court abstained under *Railroad Commission v. Pullman Co.,*[143] which requires a federal court to abstain and direct federal plaintiffs to seek redress in state court when a determination of state law might obviate the need for resolution of federal issues.[144]

The plaintiffs thereupon sued in state court and raised both their federal and state claims. They lost on all issues at the trial level as well as on appeal to the state supreme court.[145] When they returned to the federal district court, the defendant's motion to dismiss on res judicata grounds was granted.[146] The Supreme Court reversed, rejecting the defense of res judicata: "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."[147]

The Court ruled that claim splitting is permissible and that a litigant may return to federal court to litigate his federal claims once the state action has been completed,

138. *Id.* at 708.
139. 375 U.S. 411 (1964).
140. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).
141. *Id.* at comment a. *See also* UMW v. Gibbs, 383 U.S. 715, 725 (1966).
142. 375 U.S. 411, 412–13 (1964).
143. 312 U.S. 496 (1941).
144. *See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J. concurring).
145. The state supreme court declined to review the intermediate appellate court order. 375 U.S. 411, 413–14 (1964).
146. *Id.* at 414.
147. *Id.* at 415.

but only when the federal claims have not been litigated in state court.[148] "[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court."[149] Because of the uncertainty of the law before *England,* the Court applied its rule prospectively and permitted full relitigation, even though the plaintiffs in *England* had fully raised their federal claims and lost in state court.

England demonstrates two very important principles. The first is that, without any reference to the full faith and credit statute, common-law principles of res judicata, or Louisiana law on relitigation, the Court permitted full relitigation of not only issues which could have been but were not raised previously, but also those which were fully litigated.[150] Second, going beyond the *England* litigation itself, the Court announced a federal rule that binds state courts: a party in state court may inform the court that all federal claims in the cases are being reserved for federal court review and may "return to the District Court unless it clearly appears that he voluntarily . . . fully litigated his federal claims in the state courts."[151]

The Court emphasized the value to the litigant of fact determination by a federal court and remarked, "How the facts are found will often dictate the decision on the federal claims."[152] Because the Court recognized that the possibility of review of a state court determination by the Supreme Court was an inadequate substitute for the right to litigate in federal court, it permitted return to the federal court.

The *England* decision does not stand for the broad proposition that federal courts are free to disregard the full faith and credit statute and res judicata rules whenever they desire or whenever it appears equitable.[153] But *England* does indicate that when federal litigants are forced into state courts due to judge-made rules reflecting comity and the desire to avoid constitutional adjudication, federal courts are free to decide how much relitigation to permit.

Yet *England* has never been applied by the Supreme Court to cases outside the *Pullman* area. This does not mean that the Court lacks the power to do so. The difficulty is with the current Court's tendency to bar relitigation in the federal courts.[154] Section 1983 plaintiffs who are barred by the judge-made rule of *Younger* from recourse to a federal forum before completion of ongoing state court litigation may be seen as occupying a position comparable to that of *Pullman* plaintiffs. If the Court saw them in this way and believed that *Younger* unfairly forced them into state court as their only forum, it could permit relitigation, as in *England.*

This reasoning ignores a central difference between *Pullman* and *Younger.* In *Pullman* cases the federal plaintiff is sent to state court only in order to litigate state

148. *Id.* at 416.
149. *Id.* at 419.
150. *Id.* at 416–17.
151. *Id.* at 421.
152. *Id.* at 416.
153. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981).
154. *See* Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection,* 5 HOFSTRA L. REV. 545 (1977).

claims. The invitation to return is built into the doctrine of *Pullman* abstention. In *Younger* abstention, by contrast, the federal plaintiff is sent to state court to litigate the whole case, and the federal court action is dismissed without retention of jurisdiction. Abstention is ordered not to avoid the federal issues, but to avoid the federal court.[155] The current Supreme Court is unlikely to be sympathetic to the argument that after *Younger* abstention a state party may reserve federal claims for a federal forum.

C. *Claim Splitting Beyond* England

A number of federal courts have permitted litigation of federal claims in a section 1983 action which followed completed state court proceedings in which the federal claims had not been raised. While these courts have not permitted relitigation of federal claims raised and lost, they have permitted claim splitting. For example, the Second and Third Circuits have permitted even state court plaintiffs who failed to raise federal claims in the state court to sue in federal court under section 1983 and challenge collaterally the state court judgment.[156] After *Migra,* these cases are no longer good law.

Nevertheless, it is possible that the Supreme Court would permit claim splitting when, as in child protective proceedings, the federal plaintiff was an involuntary state court defendant. Since Migra was a state court plaintiff, the case does not hold that state court defendants are prohibited from claim splitting. Two aspects of the case lead to this conclusion. First, the Court pointed out that Migra "could have obtained a federal forum for her federal claim by litigating it first in a federal court."[157] Given *Moore v. Sims,* parents may not obtain a federal forum before the state court proceeding. Second, at least four justices—including Justice Blackmun, the author of *Migra*—have said that involuntary state court defendants ought to be entitled to preserve their federal claims for a federal forum. Justice Blackmun observed in a footnote in *Migra* that he had dissented in *Allen* and that the critical distinction for him between *Migra* and *Allen* was that McCurry was a state court defendant.[158] In addition, Justices Brennan, Marshall, and Stevens, all of whom joined the Court's opinion in *Migra,* have argued in the past that state court defendants should be

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155. *See* Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980).

156. *See, e.g.,* Grossman v. Axelrod, 646 F.2d 768 (2d Cir. 1981) (federal court review allowed of state's efforts to recoup Medicaid overpayments); Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979) (seeking federal relief for denial of chiropractic license), *rev'd on other grounds,* 446 U.S. 478 (1980); New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied,* 439 U.S. 894 (1978); Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978) (denial of disability benefits subject to constitutional review); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974) (civil rights action after state court review of teacher termination), *cert. denied,* 420 U.S. 476 (1975); *see also* C. WRIGHT, A. MILLER & E. COOPER, 18 FEDERAL PRACTICE AND PROCEDURE § 4471, at 719 n.54 (1981 and Supp. 1982) [hereinafter cited as WRIGHT & MILLER].

In *Burke* the Third Circuit ruled that a state court judgment forecloses a § 1983 litigant from raising grievances in federal court only if such claims have been pressed before, and decided by, a state tribunal. 579 F.2d 764, 774 (3d Cir. 1978). In the words of the court, "To hold that state court litigation bars a federal forum from deciding any claims which might have been raised before the state court would turn the state court into quicksand." *Id.* at 774.

157. Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 898 (1984).

158. *Id.* at 898 n.7. Justices Brennan, Marshall, and Stevens joined Justice Blackmun in his dissent in *Allen.*

entitled to preserve their federal claims for a federal forum.[159] Thus, it is highly unlikely that those justices understand *Migra* to foreclose all possibilities of claim splitting. Otherwise, they probably would have dissented or concurred specially to explain their own views. On the other hand, the thrust of the reasoning in *Migra* does seem to support a complete extension of the full faith and credit statute to the res judicata effect of state court decisions regardless of the posture of the state court litigant. If "[i]t is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments,"[160] then it is difficult to see how it will matter to a majority of the current Court whether the state court litigant was a plaintiff or a defendant.

It may still be that a parent can reserve his or her claims for federal court review. The res judicata effect of a court's judgment in another court is only the same as in the rendering court.[161] Litigants may utilize this rule to persuade a federal court that under state law the state court judgment would not pose a bar to the subsequent action.[162] In addition, when both parties or the court acquiesce in claim splitting a second action is often permitted.[163] Thus, even if the Supreme Court ultimately limits *England* to its facts, an *England* reservation may well be useful, provided that the court or the adversary accepts the reservation.

D. *The Full and Fair Opportunity Requirement*

When either the parents or the children were not represented by counsel in the original proceeding, a court may permit relitigation since a necessary precondition to full res judicata effect is that the litigant had a full and fair opportunity in the first forum. As the Supreme Court recognized more than forty-five years ago, inadequacy of counsel undercuts the very competence and jurisdiction of the trial court.[164] In

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159. *See* Board of Regents v. Tomanio, 446 U.S. 478, 492–93 (1980) (Stevens, J., concurring); *id.* at 495–98 (Brennan, J., dissenting). Justice Stevens wrote that he would not penalize a litigant who decides to bring suit in the state courts first,

> for such a decision gives the State an opportunity to correct, through construction of state law, a potential constitutional error, and may obviate entirely any need to present the claim to a federal court. It would also make no sense to me in terms of either federalism or judicial administration to require a litigant who files an action in state court to proceed simultaneously in federal court in order to avoid a time bar.

Id. at 493. Justices Brennan and Marshall also thought it entirely appropriate that litigants may choose to sue first in state court though not required to do so and that comity is served by allowing litigants this choice. When litigants have made this choice, Justice Brennan argued, it would be "inconsistent with federal law and the Constitution to enforce state . . . res judicata rules that close the door of the federal courthouse." *Id.* at 497. Likening the *Tomanio* situation to that in *England*, Justice Brennan argued that "[p]ermitting a plaintiff to reserve his federal claims would make the choice to litigate state claims in state court a palatable one; and where that choice is exercised the parties and system alike may benefit." *Id.*

Thus, Justices Brennan, Marshall, and Stevens would have permitted state plaintiffs to split their state and federal claims. A fortiori, this approach would permit claim splitting by involuntary state court defendants.

160. 104 S. Ct. 892, 897 (1984).

161. Wright v. Georgia R.R. & Banking Co., 216 U.S. 420 (1910); 28 U.S.C. § 1738 (1982); WRIGHT & MILLER, *supra* note 156, § 4469, at 659–60.

162. *See, e.g.*, Haring v. Prosise, 103 S. Ct. 2368 (1983) (holding § 1738 and Virginia law did not preclude § 1983 action).

163. RESTATEMENT (SECOND) OF JUDGMENTS § 26(a)-(b) (1982).

164. Johnson v. Zerbst, 304 U.S. 458 (1938); *see also* Note, *State Prisoners' Suits Brought on Issues Dispositive of Confinement: The Aftermath of* Preiser v. Rodriguez *and* Wolff v. McDonnell, 77 COLUM. L. REV. 742 (1977).

1981, however, the Supreme Court decided that the federal constitution does not necessarily require that parents be provided with counsel in termination of parental rights cases.[165] The Court undoubtedly would rule the same way in an ordinary neglect proceeding[166] since the consequences of a termination proceeding are significantly greater and the issues often are more complex.

Applying the *Betts v. Brady*[167] test, the Court in *Lassiter v. Department of Social Services* ruled that case-by-case evaluation of when counsel is necessary adequately meets the requirements of the due process clause of the fourteenth amendment. *Lehman* bars federal review by habeas corpus regardless of the underlying substantive constitutional claim. Once state proceedings are no longer available by direct review, either because they were fully exhausted or they were not timely pursued, collateral attack by section 1983 is clearly available. To overcome the defense of collateral estoppel the parent must claim and prove that the lack of counsel at the state proceeding denied a full and fair opportunity to litigate the claims.[168]

Similarly, if the children were not provided with counsel in the state proceeding,[169] or if their counsel was inadequate,[170] they may be permitted to relitigate the claims decided in the state proceeding under the same reasoning. Indeed, the *Restatement (Second) of Judgments* expressly excepts from the ordinary rule of res judicata a judgment that changes a person's status whenever that person is not entitled to contest the existence of that status.[171] Arguably, no illustration meets this test better than a termination of parental rights proceeding affecting an adolescent child who is not provided with counsel so as to afford him or her a meaningful opportunity to be heard.

IV. Adding up the Score—Damages and Beyond

The foregoing analysis sheds light on the combined effects of *Moore v. Sims, Lehman v. Lycoming County Children's Services, Allen v. McCurry, Wooley v. Maynard,* and *City of Los Angeles v. Lyons. Sims* prevents a parent from suing in

165. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).

166. *See* Davis v. Page, 714 F.2d 512 (5th Cir. 1983) (per curiam) (due process requires only case-by-case determination whether counsel must be appointed in state dependency proceedings).

167. 316 U.S. 455 (1942).

168. *See, e.g.*, Rhoades v. Penfold, 694 F.2d 1043 (5th Cir. 1983). In *Rhoades* a federal action was allowed after a final state court action resulted in termination of parental rights. Faced with a claim by the defendants that the court lacked jurisdiction to review a state court judgment in light of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the Fifth Circuit reasoned that jurisdiction was allowed since the federal action is more properly perceived as a request for an injunction enjoining the enforcement of an invalid state judgment instead of a reversal of the judgment itself. 694 F.2d 1043, 1046–47 (5th Cir. 1983). As to the claim that the action is barred by res judicata, the court wrote that the parent "is not attempting to relitigate any of the substantive issues underlying the state court's judgment." *Id.* at 1048. Rather than "attack the state court's decision on the merits of the termination issue through defenses or claims that arise out of the [parent-child] relationship," the parent only contends that the proceeding itself deprived him or her of due process. *Id.*

169. *See* Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76 (1984).

170. For example, conflicts of interest can render counsel inadequate. *See, e.g.*, Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1194–95 (S.D. Tex. 1977), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979); Roe v. Conn, 417 F. Supp. 769, 780 n.14 (M.D. Ala. 1976).

171. Restatement (Second) of Judgments § 31(2)(c) (1982).

federal court to challenge state laws or procedures invoked to separate children from parents involuntarily while state proceedings are ongoing. *Lehman* precludes parents from seeking federal review by habeas corpus after fully exhausting state remedies. *Allen* arguably precludes collateral review by means of section 1983. *Maynard* permits seeking prospective relief without challenging the state court judgment, but *Lyons* requires that a plaintiff show that he or she is likely to be harmed by the challenged practices in the future.

The practical effect of this scorecard remains to be considered. What can parents do to get into federal court given these precedents? Parents are threatened with charges of unfitness in a number of ways. For example, Ms. X may have a social worker from the welfare department who when visiting regularly complains about the conditions in her home. During several of these visits, the social worker has warned Ms. X that if conditions do not improve charges of neglect will be filed in the juvenile court. Ms. X, upset by these threats, consults an attorney who advises her that the vagueness of the neglect statute under which she has been threatened may be attacked as unconstitutional. The lawyer explains that the statute (1) is not written with sufficient precision to give her adequate notice of what conduct may result in loss of her children; (2) is subject to arbitrary and discriminatory enforcement; (3) fails to further a sufficiently important child protection interest; and (4) unduly delegates legislative authority for defining parental misconduct to welfare officials and judges. Ms. X retains the attorney to bring suit in federal court under section 1983 to redress her rights.

Ms. Y has been the subject of three separate anonymous reports of suspected child neglect within the past year. On all three occasions, social services officials visited her home, investigated, and decided not to pursue charges. During discussions leading to the agreement to place a homemaker on a voluntary basis, the social workers made it plain to Ms. Y that they were unhappy with the conditions in her home. Nevertheless, because she had been agreeable to using the services of a homemaker, the workers decided not to file any action in court, at least until they determined that court assistance was necessary.[172]

Ms. Y consults a legal services lawyer complaining about the intrusion of the homemaker into her home. She is afraid that if she refuses to accept the homemaker's services the child welfare authorities will try to take her child away. The lawyer confirms her fears and advises her that an affirmative action in federal court under section 1983 may provide her with the opportunity for a declaration of her federal constitutional rights. Since the state neglect law authorizes emergency removal of children based on a reasonable belief of neglect, without requiring a showing of imminent risk of death or serious physical injury, the lawyer recommends a challenge to its legality.

Are these suits maintainable? Do either Ms. X or Ms. Y have standing to challenge the statutes? Are their actions ripe for federal review?

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172. In fact, federal law mandates use of preventive services as a precondition to receipt of federal funds for removing children and placing them in foster care. *See* 42 U.S.C. §§ 671(a)(15), 672(a) (Supp. IV 1980).

The minimal constitutional requirement for standing is "injury in fact."[173] Both plaintiffs in these hypothetical examples can point to something which arguably constitutes injury in fact. Ms. X complains that the threats which have been made to her have caused her anguish and suffering and that the threats could be made only because the neglect statute is vague. Ms. Y claims that she is harmed by the homemaker's presence and that she gave her consent only in light of threats of emergency removal of her child.

These injuries are obviously tenuous. Yet, if neither Ms. X nor Ms. Y has a strong probability of maintaining an action in federal court, it seems impossible for anyone to challenge the vagueness or overbreadth of a neglect statute without being charged under the law.[174]

A. *Abuse and Neglect Proceedings*

By far the best plaintiffs and perhaps the only ones who have any hope of suing in federal court are the parents who have already been charged and prosecuted under the statute. Consider first the parents who have been found neglectful. They may not have challenged the statute on federal grounds in the state court proceedings. Assume, however, that they did raise the federal grounds fully and lost on both state and federal grounds. The adjudication of neglect would be res judicata, but res judicata would be a bar in federal court only when the state court judgment may not be attacked collaterally under the laws of the rendering state. In many states, for example, termination of parental rights orders may be attacked collaterally for up to one or two years after the judgment.[175] When res judicata is a bar in federal court, the parents would also be collaterally estopped from relitigating the issue of the constitutionality of the statute,[176] regardless of the type of suit they filed in federal court,

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173. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

174. A search of the reported federal decisions revealed not a single case in which such a suit was brought. The closest case found was Doe v. Staples, 706 F.2d 985 (6th Cir. 1983). In that case a rare combination of events permitted a mother and her child to sue in federal court seeking invalidation of an emergency removal statute. The mother had been an inmate in prison, during which time her child was placed in the legal custody of the county welfare department. Upon the mother's release from prison, the child was placed in her physical custody, but legal custody remained with the welfare department. Without giving the mother any notice or opportunity to be heard, the welfare department summarily removed the child from her custody three years after the mother and child had been reunited. Because the department already had legal custody of the child, it did not bother going to court or charging the mother with any wrongdoing. *Id.* at 986–87.

On these facts, the mother and child sued in federal court. Although the court's opinion did not discuss the matter, plainly both plaintiffs had standing to bring the suit. Because there were no ongoing state court proceedings, *Moore v. Sims* was no bar either. Although the department could have worked a "reverse removal" by responding to the federal complaint by filing state court neglect charges (*see* Hicks v. Miranda, 422 U.S. 332 (1975)), it did not employ that tactic.

On the merits, the federal court declared that the summary removal procedures must be limited by additional due process requirements beyond those imposed by the lower court. 706 F.2d 985, 990 (6th Cir. 1983). The only mention of court avoidance techniques occurs in Judge Contie's dissent; he argues that the district court should have abstained in accordance with *Railroad Comm'n v. Pullman*. *Id.* at 992–93.

175. *See, e.g.*, MO. ANN. STAT. § 453.140 (Vernon 1977) (one year); NEB. REV. STAT. § 43–116 (1978) (two years).

176. Of course, a litigant may be fortunate enough to bring a case in which a possible defense is not raised. This has happened in perhaps the most celebrated termination of parental rights case ever decided in the federal courts. *Compare* Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976) (res judicata defense not pleaded by defendants and thus waived) *with* Castorr v. Brundage, 674 F.2d 531 (6th Cir. 1982), Blair v. Supreme Court, 671 F.2d 389 (10th Cir. 1982), *and* Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979).

so long as they had a full and fair opportunity to raise the federal issues in the state courts.[177]

If the parents did not raise any federal claims in state court, their capacity to sue in federal court may depend on the purpose of the suit. If they wish to attack collaterally the state court judgment itself, the rules against claim splitting already discussed will be determinative. A damages action, however, clearly would not be barred, although it cannot be maintained against all state officials who violate a citizen's constitutional rights. Because of the doctrine of sovereign immunity, judges[178] and prosecutors[179] are absolutely immune from suit. If a damages action can be maintained in the child protection area, the defendants in federal court would likely be child protective workers, child protective agencies, or, under the doctrine of *Monell v. Department of Social Services,*[180] a municipality. Social workers and child protective agencies may be entitled to a qualified immunity that permits invocation of a good-faith defense to charges of illegality, but courts generally have not afforded these parties absolute immunity.[181] If the suit is against a municipality, however, and it challenges policies or practices of the government, courts will impose absolute liability on the defendants for violations of a parent's constitutional rights regardless of their good faith.[182]

In these actions, of course, collateral estoppel will preclude the parents from relitigating issues that were fully litigated and necessary to the state court adjudication of neglect. This will ordinarily be no bar to a damages action against a child protective worker since the issues which are litigated in a neglect proceeding focus primarily on the conduct of the parents and the constitutionality of the statute defining neglect, not on the conduct of the social worker. Even though the Court in *Sims* concluded that Texas courts allow the claim of an illegal seizure of a child to be raised as a permissive counterclaim in a neglect proceeding,[183] such a counterclaim plainly is no defense or bar to an adjudication of neglect. Even if it were a bar, *Prosise* makes it clear that the failure to raise an issue which could have been raised does not estop a federal plaintiff from raising that issue in a subsequent action. Moreover, in cases like *Prosise* the defense of an illegal search, if successful, may result in an acquittal if the evidence suppressed is vital to the prosecution's case. A fortiori, an unlitigated claim of illegal seizure in a neglect proceeding—a proceeding in which the exclusionary rule does not apply—may be raised in a subsequent lawsuit.

Thus, although *Sims* requires abstention whenever the issues raised in the federal case are not "clearly bar[red]"[184] in the ongoing state proceedings, the federal plain-

177. *See supra* subpart III(D). The finding of constitutionality, once raised and rejected, would be necessary to the determination of neglect.

178. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

179. Imbler v. Pachtman, 424 U.S. 409 (1976).

180. 436 U.S. 658 (1978).

181. *See, e.g.*, Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983); Langton v. Maloney, 527 F. Supp. 538 (D. Conn. 1981); Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y 1980). *But see* Whelehan v. County of Monroe, 558 F. Supp. 1093 (W.D.N.Y. 1983).

182. Owen v. City of Independence, 445 U.S. 622, 657 (1980).

183. 442 U.S. 415, 424 & n.9 (1979).

184. *Id.* at 426.

tiff is not required to raise the federal claim in the state proceeding. *Prosise* makes clear that when, for any reason, the state defendant does not raise a federal claim he or she may bring it up later in a section 1983 action. Even when the federal claim was raised and decided adversely to the parent, the parent will not be barred from relitigating the issue in federal court so long as the claim was not an issue necessary to the adjudication of neglect.[185]

A parent who is found neglectful may also seek a declaratory judgment solely for prospective relief, as was permitted in *Maynard*. If the parent can meet the standing problems inherent in such a suit, including those of ripeness and mootness,[186] the action should be maintainable. This may be possible especially when the children are paroled to the custody of the parents after an adjudication of neglect. In such a case, the parents may be able to demonstrate sufficiently a probability of future application of the neglect statute. The parents may also be able to show the requisite probability when they have one or more children who were not the subject of the original proceeding. The dispute over the children already subject to state proceedings may be moot or res judicata, but the focus on the other children will involve questions of ripeness.

If the parents win in the state court, their capacity to sue as plaintiffs in federal court, other than for damages, will depend on the likelihood of future involvement with the statute. After *Lyons*, mere past involvement clearly will not confer jurisdiction. The grounds for winning may be critical in determining whether the parent continues to have a sufficient stake to seek a determination of the constitutionality of the neglect statute.[187] Thus, it will be necessary to study the trial court's opinion and findings of fact to determine if a reasonable showing could be made in federal court that future charges are likely to be brought if certain nonspeculative preconditions are met.

Beyond the ruling of the court, a myriad of other factors may have bearing upon the likelihood of future charges. The nature of the charges, the parent's conduct which led to the charges, as well as the presence of siblings, all must be considered in determining whether standing can be shown.

B. *Termination of Parental Rights*

Although the Supreme Court has not squarely addressed the issue, it is clear that the Court's reasoning in *Moore v. Sims* is fully applicable to termination of parental rights proceedings and that ongoing state proceedings will bar a parent from initiating

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185. *See* Haring v. Prosise, 103 S. Ct. 2368 (1983). Procedural irregularities rarely will be reached by state courts. Even when they are reached, such issues are not necessary to the judgment. *See, e.g.*, Tucker v. Marion County Dep't of Pub. Welfare, —Ind. App.—, 408 N.E.2d 814 (1980); Coleman v. Texas State Dep't of Pub. Welfare, 562 S.W.2d 554 (Tex. Civ. App. 1978).

186. *See supra* subpart II(D). As Professor Monaghan put it, "[m]ootness is . . . the doctrine of standing set in a time frame." Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973).

187. If the parents reserved their federal claims in the state proceedings in accordance with *England*, or even if they did not, as long as the state court decides the case in their favor without reaching the federal claims, there can be no res judicata bar to a federal action. Though res judicata would not be a bar, mootness may preclude the federal action.

a federal court challenge. It follows that the strategies proposed in this Article for litigating or relitigating federal claims after the state abuse and neglect proceedings have been completed are equally relevant to termination proceedings.

What distinguishes termination issues and what makes the prospect of federal court access somewhat brighter in this area is the potential for prospective rulings in federal cases brought before state proceedings are commenced. The standing principles already discussed apply with full force here, but because of the factual differences between the way parents are charged with neglect, on the one hand, and the way parental rights are terminated, on the other, there are significantly greater opportunities to persuade a federal court that parents have standing to challenge a termination statute before they are charged under it.

Neglect charges are based on discrete, past acts. The focus of the proceeding is almost wholly retrospective. The relevant inquiry concerns what the parents did. In addition, parents usually do not know in advance when they will be charged with neglect or abuse since state officials charge parents with misconduct as soon as they become aware of danger to the children.[188]

In sharp contrast, termination proceedings usually are initiated only after state officials have carefully reviewed the parents' conduct. Instead of focusing on discrete, past acts, the proceeding frequently is concerned with parental behavior over a year or more. In many states, termination proceedings may not be initiated until children are out of their parents' home for at least one year. New York's scheme, which was the subject of litigation in *Santosky v. Kramer*,[189] is illustrative. In New York, termination may be ordered only if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child."[190] Thus, parents whose child is in foster care know that a termination proceeding may be initiated against them after one year. Indeed, the social worker may have warned them of an intention to bring such an action. But the parent may not know the meaning of "plan for the future of the child." The parent may believe such a phrase is so unconstitutionally vague or substantively insufficient that any termination under its authority would be in violation of the constitution.

The more parents have reason to believe they will be charged under the statute, the greater the probability they can demonstrate to a federal court that they have standing to bring a declaratory judgment action. Though there may be a ripeness or standing problem, particularly when a caseworker has threatened the parent with a termination proceeding, "the spectre of a [termination of parental rights] suit involving the [parents] is sufficient to confer standing."[191] The factual possibilities are

188. *See, e.g.*, Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd sub nom.* Moore v. Sims, 442 U.S. 415 (1979).

189. 455 U.S. 745 (1982).

190. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983).

191. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1190 (S.D. Tex. 1977) (three-judge court) (citing O'Shea v. Littleton, 414 U.S. 488 (1974), and Massachusetts v. Mellon, 262 U.S. 447 (1923)), *rev'd sub nom.* Moore v. Sims, 442 U.S. 415 (1979).

endless. In all events, the possibility of securing a federal forum to challenge a termination statute before a state action has commenced is significantly greater than is the possibility of challenging a neglect statute in the same procedural posture.

V. CONCLUSION

In our federal system, the complete development of constitutional norms is significantly enhanced when the federal judiciary occasionally is able to interpret the Constitution. The preclusion of the federal judiciary from playing any role in the developing law of child protection is especially ill-advised. The determination of constitutional limits on state power coercively to remove children from parents' custody or permanently to destroy parental rights presents complex problems. Without suggesting that state judges are more hostile to federal claims than federal judges the latter frequently see challenges to state practices with fresh eyes unburdened by local concerns for making sure the state system does its intended job. State judges sometimes need and benefit from these fresh perspectives. The federal judiciary began to get involved in the child protective area in two very important cases in the mid-1970s, *Alsager v. District Court*[192] and *Roe v. Conn.*[193] When a federal court decided what could have been a third important case, *Sims v. State Department of Public Welfare,*[194] the Supreme Court reversed on procedural grounds in a decision which struck a major blow to litigants seeking federal review of state practices in this substantive area.

The Burger Court has been largely successful in barring access to federal courts on issues of child protection. The degree of its ultimate success remains to be determined. It may yet be possible for parents to sue in federal court, but it will require careful planning and attention to procedural detail. It is hoped that this Article can serve to stimulate ideas and approaches for lawyers who believe that federal litigation in child protective law is important, both for individual cases and for the ultimate development of the law.

192. 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam,* 545 F.2d 1137 (8th Cir. 1976).
193. 417 F. Supp. 769 (M.D. Ala. 1976) (three-judge court).
194. 438 F. Supp. 1179 (S.D. Tex. 1977) (three-judge court), *rev'd sub nom.* Moore v. Sims, 442 U.S. 415 (1979).